(b)(6)

U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave. N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

DATE: MAR 1 1 2013 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner claims to be a Florida corporation that seeks to employ the beneficiary in the United States as its president and general manager. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

In support of the Form I-140 the petitioner submitted a statement dated October 18, 2010, which contained relevant information pertaining to the beneficiary's employment abroad and with the petitioning entity. The petitioner also provided a copy of its organizational chart as well as corporate and financial documents pertaining to the petitioner and its foreign affiliate.

The director reviewed the petitioner's submissions and determined that the petition did not warrant approval. The director therefore issued a request for evidence (RFE) dated October 13, 2011 informing the petitioner of various evidentiary deficiencies. Two of the issues addressed in the RFE concerned the beneficiary's proposed employment in the United States and her prior employment abroad. Specifically, the director instructed the petitioner to list the beneficiary's daily job duties and assign time constraints to each task, and provide job descriptions of the beneficiary's subordinates, the IRS Form W-2 statements the petitioner issued to its employees during the relevant time period, and the petitioner's quarterly tax reports for all four quarters in 2010 and 2011.

The petitioner's response included a statement dated December 16, 2011 from representing the petitioner's foreign affiliate in Brazil. discussed the beneficiary's employment abroad first with and subsequently with , the petitioner's foreign affiliate. The petitioner also submitted statements dated December 29, 2011 and February 22, 2012, both of which conveyed identical information about the beneficiary's employment with the U.S. entity, and a statement dated February 12, 2012, which indicated that the foreign entity, merged with the petitioner's foreign affiliate where the beneficiary was employed directly prior to her entry to the United States to work for the petitioning entity. The February 2012 statement referred to a "contractual alteration" document that was provided in the RFE response and was intended to serve as evidence of "an official consolidation" of which was established in July 1997, and which was established as a partnership in March 2007.

After considering the petitioner's response, the director determined that the petitioner failed to demonstrate eligibility for the immigration benefit sought herein and issued a decision dated January 26, 2012 denying the petition. The decision was based on two grounds of ineligibility: (1) the petitioner's failure to establish that the beneficiary's proposed U.S. employment would be in a qualifying managerial or executive capacity; and (2) the petitioner's inability to show that the beneficiary was employed abroad for the statutorily required period of one year within the three years preceding the beneficiary's entry to the United States to work for the U.S. petitioner.

On appeal, counsel disputes the director's decision, contending that the beneficiary acquired at least one year of experience in a managerial or executive capacity with a qualifying entity abroad. Counsel points out that the director's decision uses two different receipt numbers when

identifying the petitioner in the heading portion of the denial. Counsel contends that such error indicates the possibility that the director confused the petitioning entity with another entity that also filed a Form I-140 to which a different receipt number was assigned. Counsel further contends that the director's reference to the petitioner's evidence "at the time of filing" indicates that the director failed to consider information that was subsequently provided in the RFE response, which included the beneficiary's job description with the U.S. employer. Finally, with regard to the beneficiary's employment abroad with a qualifying entity, counsel reiterates the petitioner's prior claim asserting that was consolidated with when the latter entity was created in 2007. Counsel again refers to a contractual alteration document as supporting evidence of the alleged merger between

The AAO has reviewed counsel's supporting statements as well as the supplement documents that the petitioner has submitted up to now. The AAO finds that neither counsel's assertions nor the supporting documents are persuasive in overcoming the director's findings. The AAO has provided full discussion of the relevant supporting documents and the AAO's findings in regard thereto.

Section 203(b) of the Act states in pertinent part:

> (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
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> * * *
>
> > (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

The first issue to be addressed in this proceeding pertains to the beneficiary's proposed employment with the U.S. entity. Specifically, the AAO will examine the record to determine whether the petitioner submitted sufficient evidence to establish that the beneficiary would allocate her time primarily to the performance of tasks that are in a qualifying managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

> The term "managerial capacity" means an assignment within an organization in which the employee primarily--
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> (i) manages the organization, or a department, subdivision, function, or component of the organization;
>
> (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
>
> (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
>
> (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

> The term "executive capacity" means an assignment within an organization in which the employee primarily--
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> (i) directs the management of the organization or a major component or function of the organization;
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> (ii) establishes the goals and policies of the organization, component, or function;
>
> (iii) exercises wide latitude in discretionary decision-making; and
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> (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In general, when examining the executive or managerial capacity of the beneficiary, the AAO reviews the totality of the record, starting first with the petitioner's description of the beneficiary's job duties. *See* 8 C.F.R. § 204.5(j)(5). A detailed job description is crucial, as the duties themselves will reveal the true nature of the beneficiary's foreign and proposed employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The AAO will then consider this information in light of other relevant factors, including (but not limited to) job descriptions of the beneficiary's subordinate employees, the nature of the business conducted by the entity in question, the size of the subordinate staff of

the U.S. entity, and any other facts contributing to a comprehensive understanding of the beneficiary's actual role within the petitioner's organization.

In the present matter, the AAO finds that the director was correct in determining that the petitioner failed to provide an adequately detailed description of the beneficiary's proposed job duties accompanied by the requested percentage breakdown indicating the amount of time the beneficiary would dedicate to each of her assigned daily tasks. For instance, the petitioner broadly stated that the beneficiary would coordinate, oversee, direct, and control company operations in providing body and face treatments and selling skin care products. The AAO is unable to gain a meaningful understanding of the actual tasks that are indicative of coordinating, overseeing, directing, or controlling company operations. In fact, these terms are so vague that they can actually be used to describe most any individual who assumes a leadership role in any industry, regardless of whether that individual allocates his or her time primarily to performing tasks within a qualifying managerial or executive capacity. More detailed information is required to convey a proper understanding of what tasks qualify as coordinating, overseeing, directing, and controlling a business that is engaged in providing spa services.

While the petitioner provided adequate documentation to establish that it employs workers who actually work with customers to provide face and body treatments, the AAO cannot assume that the numerous other operational and administrative tasks are not provided by the beneficiary herself, particularly given the limited size of the petitioner's support staff, which is comprised of three subordinate employees. The petitioner's claim that the beneficiary would allocate a "majority" of her time to qualifying tasks is simply insufficient without adequate supporting evidence delineating the beneficiary's daily tasks, the tasks of her subordinates, and information clarifying how the beneficiary's subordinates support her managerial or executive role by relieving her from having to allocate her time primarily to non-qualifying tasks. Conclusory assertions regarding the beneficiary's employment capacity and repeating the language of the statute or regulations are not sufficient to meet the petitioner's burden of proof. Similarly, providing examples of how the beneficiary's ideas further the petitioner's business objectives does not establish that the beneficiary primarily performs qualifying managerial- or executive-level tasks.

Furthermore, while the AAO acknowledges that no beneficiary is required to allocate 100% of his or her time to managerial- or executive-level tasks, the petitioner must establish that the non-qualifying tasks the beneficiary would perform are only incidental to the proposed position. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). In the present matter, the AAO finds that the record's lack of a detailed description of the beneficiary's proposed job duties precludes an affirmative determination as to the managerial or executive capacity of the proposed U.S. employment.

Next, the AAO turns to the issue of the beneficiary's employment abroad and whether the beneficiary has the requisite one year of employment abroad with a qualifying entity.

The regulation at 8 C.F.R. § 204.5(j)(3)(i) states, in part, the following:

> A) If the alien is outside the United States, in the three years preceding the filing of the petition the alien has been employed outside the United States for at least one year in a

managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or

B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity[.]

In other words, in determining whether the beneficiary has the requisite one year of employment abroad, U.S. Citizenship and Immigration Services looks to the three-year period preceding the time of the alien's application and admission as (or change of status to) an L-1A multinational managerial or executive classification.

In the present matter, the director observed that the foreign entity, where the beneficiary was employed prior to entering the United States to work for the U.S. petitioner, was established on March 15, 2007 and that the beneficiary entered the United States to work for the petitioner on April 18, 2007, only one month after the foreign entity was established. The director therefore determined that the beneficiary does not have the requisite one year of employment abroad with a qualifying entity.

On appeal, counsel disputes the director's finding, urging the AAO to focus on a contractual alteration document, which he believes addresses the issue at hand. Counsel also refers to the beneficiary's sworn statement, which discusses the reason for changing the original company [redacted] to the new company [redacted] Plainly put, counsel's assertions appear to be premised on the belief that the two companies merged and that the previously existing company, [redacted] which the beneficiary formed as a sole proprietorship in 1997, later became part of [redacted] which the beneficiary and her husband established as a partnership in 2007.

After reviewing all relevant documents, the AAO finds that there is absolutely no evidence that would establish the existence of the claimed merger between the two companies. While the AAO acknowledges the petitioner's submission of documents that establish the creation of the sole proprietorship and the later creation of a partnership, there is no indication that the former sole proprietorship continues to exist in the form of a partnership, whose articles of incorporation and contractual alternation documents make no mention of a merger with [redacted]

Regardless of whatever the beneficiary's intent may have been at the time the foreign partnership was formed, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). In the present matter, the record indicates that the beneficiary established a sole proprietorship where she worked until she helped form a partnership, where she worked during the month prior to entering the United States to be employed by the petitioning U.S. entity. There is no evidence that the sole proprietorship continues to exist and do business at the present time. While the record contains sufficient evidence to establish that a qualifying affiliate relationship exists between the foreign partnership and the petitioning entity, this evidence does not help to establish that the beneficiary meets the foreign employment requirement discussed at 8 C.F.R. § 204.5(j)(3)(i)(B).

Finally, while counsel proceeds to undermine the validity of the director's decision by pointing out that the director relied only on evidence submitted at the time the Form I-140 was filed and by referencing a receipt number that appears at the heading of the denial decision but that does not belong to the petitioner, the AAO finds that both are superficial flaws that do not warrant withdrawal of the director's otherwise sound analysis. The AAO finds that greater focus must be placed on the director's analysis, which cites to and addresses facts that pertain specifically to the petitioner, thus indicating that the incorrect heading contained at pages three and five of the decision, which references a different petitioner's receipt number, was merely a typographical error that should not serve as a basis for discarding an otherwise valid decision. The AAO further finds that the director's express references to documents that were submitted in response to the RFE, including the beneficiary's job description that was contained in the petitioner's December 2011 and February 2012 statements, are sufficient to establish that the director was not merely relying on documents that were submitted at the time of filing, despite stating that the first adverse finding was "[b]ased on the evidence provided at [the time of] filing."

In summary, the record lacks sufficient evidence to establish that the beneficiary was employed abroad by a qualifying entity for the requisite one-year time period or that the beneficiary's proposed employment with the petitioning entity would be in a qualifying managerial or executive capacity. Therefore, based on these two adverse findings, the instant petition cannot be approved.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.